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IN THE SUPREME COURT of the UNITED STATES

October Term, 1931

DETROIT INTERNATIONAL BRIDGE COMPANY, a Michigan Corporation,
Appellant,

vs.

CORPORATION TAX APPEAL BOARD OF MICHIGAN,
Appellee.

No. 51

STATEMENT BY APPELLEE OPPOSING JURISDICTION

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IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1931

DETROIT INTERNATIONAL BRIDGE COMPANY, a Michigan Corporation, Appellant, vs. CORPORATION TAX APPEAL BOARD OF MICHIGAN, Appellee.	No. 908

STATEMENT BY APPELLEE OPPOSING JURISDICTION

The Appellee respectfully presents the reply statement provided for in Subdivision II of Rule 12 of the Rules of this Court and presents the reasons why it is believed that this Court has no jurisdiction in the matter at bar.

THE NATURE OF THE CASE

On the 5th day of April, 1932, the Detroit International Bridge Company, Appellant, by its counsel filed in the Supreme Court of the State of Michigan an application for leave to appeal to the United States Supreme Court from the judgment entered by th Supreme Court of the State of Michigan on April 5th, 1932, sustaining the opin-

ion of the Corporation Tax Appeal Board of Michigan, in favor of the validity of the statute. The order allowing the appeal was signed and entered by the Chief Justice of the Supreme Court of the State of Michigan on April 5th, 1932.

STATEMENT OF THE CASE

I.

The Detroit International Bridge Company, Appellant, in its allegation of assignment of errors filed with the Michigan Supreme Court claimed that the Supreme Court of the State of Michigan erred in holding:

"(a) That Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929 of the State of Michigan is constitutional in application to Appellant and its business.

(b) That said Act, so far as applied to Appellant does not violate Article I, Section 8, Clause 3, of the Constitution of the United States, and

(c) In applying said statute and imposing the privilege fee for the year 1930 upon Appellant the State of Michigan did not unduly interfere with and thereby usurp or violate the power of Congress of the United States to regulate such foreign commerce as is provided by Article I, Section 8, Clause 3, of the Constitution of the United States."

II.

The tax in question is imposed by virtue of the following statutes of Michigan, Act 85, Public Acts of 1921 as amended by Act 175, Public Acts of 1929, (Sections 4 (10140) and 5 (10143):

Sec. 4. "Every corporation organized or doing business under the laws of this state, excepting railroad companies and interurban railroad companies, and telephone and telegraph companies, express companies and foreign insurance companies shall, at the time of filing its annual report with the secretary of state of this state, as required by section five of chapter two of part five of act number eighty-four of the public acts of nineteen hundred twenty-one, for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

Sec. 5. "In the case of computing the franchise and privilege fees prescribed by sections three and four of this act, respectively, both as to domestic and foreign corporations, such computation shall be made upon the corporation's property, both tangible and intangible, owned or used in Michigan in the ratio that such property bears to the entire property of the corporation, and such ratio shall be applied by the secretary of state to determine the amount of the authorized capital stock owned or used in Michigan, and to determine what portion of the corporation's paid-up capital and surplus, severally, are owned or used in Michigan. The term "surplus" as used in this act, shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid-up capital; but in no case, either as domestic or as to foreign corporations, shall any deduction be made from the item of paid-up capital, in computing the privilege

fee thereon, by reason of any impairment of the same. None of the property or capital of any corporation subject to paying the privilege fee prescribed in section four which is located without the state of Michigan, and none of the capital or surplus of such corporation represented by property exclusively used in interstate commerce, shall in any case enter into the computation of the net amount of the authorized capital, or the capital and surplus, as the case may be, upon which the computation of the privilege fees shall be made: Provided, That in determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation, such property shall be considered to be located, owned or used in this state for the purposes hereof, if used in or acquired from the conduct of its business in this state, irrespective of the domicile of the corporation. The secretary of state shall in all such cases be authorized to require the corporation to furnish detailed and exact information touching such several matters before making a final determination of the privilege fee to be paid by such corporation. For the purpose of this act only, each share of no par value shall be deemed to have the value of at least one dollar, or such value as shall have been fixed by the corporation for the sale of such stock, or the book value as determined by the secretary of state, which ever may be the higher. In any case where the capital of a corporation is not divided into shares, the whole property thereof shall be deemed to be the authorized capital stock for the purpose of this act."

As will be noted, this is an annual tax on the privilege of doing business as a corporation.

It affects corporations generally and does not discriminate against corporations engaged in interstate and foreign commerce.

The Supreme Court of Michigan in Union Steam Pump

Sales v. Secretary of State of Michigan, 216 Michigan 261 so interprets the tax:

> "that it is not a property tax but a tax on the FRANCHISE to do business as a corporation within the State."
>
> "The law here under consideration levies a specific tax upon the RIGHT, the FRANCHISE to do business as a corporation."

As a Michigan corporation it has the PRIVILEGE and RIGHT to exercise its franchise and for this privilege the State is seeking to exact a privilege tax. It is Appellee's contention that the decision of the Supreme Court of Michigan is correct and contains a complete statement of the facts, and because the record of this case has not as yet been printed we are reciting the pertinent portions of the decision as rendered by the Michigan Supreme Court in this case, and which will be found in the printed record of the case before the Michigan Supreme Court included with the transcript of record filed with this Court:

"This case involves appeals by the Detroit International Bridge Company, a Michigan corporation, with its principal office in the city of Detroit, from the determination of the Corporation Tax Appeal Board fixing its annual privilege fees for the years 1929 and 1930."

The purposes for which the bridge company was organized are:

> "To Construct, own and/or operate a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches thereto:
>
> To maintain and operate such bridge and the approaches thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

The bridge is used for vehicular and pedestrian traffic across the Detroit river from Detroit to Canada. Permission and authority for its construction were granted to the Bridge Company by Act of Congress and to the Canadian Transit Company, which is now a subsidiary of the Bridge Company, by an Act of Parliament of the Dominion of Canada.

The applicable sections of Act No. 85, Pub. Acts 1921, as amended by Act No. 175, Pub. Acts 1929, requiring the payment of an annual privilege fee by corporations, appear in the margin. * * *

4. It is insisted that the Bridge Company is not subject to the payment of any annual privilege tax; that it is limited by its charter and dedication to public use, and is engaged exclusively in foreign commerce, and that the imposition of such a tax upon it violates Article 1, section 8, clause 3 of the Federal Constitution, which empowers the congress of the United States "To regulate Commerce with foreign nations."

> "We are impressed that in the discussion of this matter counsel lose sight of the nature of the privilege fee sought to be collected. It is not a tax upon the proceeds of the business of the corporation. It in no way involves the tolls collected from those using the bridge as a means of transportation between Detroit and Canada. It is a fee imposed by law "for the privilege of exercising its franchise and of transacting its business within this State." The distinction between such a fee and a tax upon property was clearly pointed out in Union Steam Pump Sales Co. v. State, 216 Mich. 261, and later in Re Truscon Steel Co., 246 Mich. 174, and in Re G. H. Hammond Co., 246 Mich. 179. The question presented is so clearly disposed of in Re Detroit & Windsor Ferry Co., 232 Mich. 574, that further discussion seems unnecessary.
>
> The cases relied on by counsel for the bridge com-

pany are, we think, easily distinguished. In Philadelphia and Southern Steamship Co. v. Pennsylvania, 122 U. S. 326, the tax was levied upon the gross receipts of a steamship company; in Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204, the State sought to regulate the rates of fare for passage over a bridge spanning the Ohio river. In Sault Ste. Marie v. Int'l Transit Co., 234 U. S. 333, the city sought to enforce the collection of a license fee, and in Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, and in State Tax Commission v. Interstate Natural Gas Company, Inc., —— U. S. —— (decided November 23, 1931), the State sought to enforce a statute providing for the collection of such a tax on corporations not organized under its laws and exclusively engaged in interstate commerce."

The decision of Michigan Tax Appeal Board was thus sustained and upheld by the Michigan Supreme Court.

THE QUESTION

The sole question is whether upon the facts presented to the Corporation Tax Appeal Board of Michigan, Act 85, Public Acts of 1921 as amended by Act 175, Public Acts of 1929 of the State of Michigan is constitutional in its application to the Detroit International Bridge Company. In other words has the State of Michigan a right to exact a privilege tax from the Appellant in this case?

ARGUMENT

THE FEDERAL QUESTION WAS DECIDED BY THE SUPREME COURT OF MICHIGAN ENTIRELY IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT AND THERE IS NO REASON TO REVIEW ITS DECISION ON APPEAL

The Detroit International Bridge Company, Appellant, was organized under the laws of Michigan in 1927 and during the period subsequent to its organization and until October of 1929 was engaged in constructing an international highway bridge across the Detroit river to Canada. During this period it conceded its liability to the State of Michigan for its privilege taxes, and filed its reports and paid the fees in accordance with Act 85, Public Acts of 1921 of Michigan. In submitting its 1930 annual report Appellant claimed the right of exemption in the payment of its privilege tax due to its claimed exercise of purpose— that of carrying on foreign commerce. It stands undisputed, therefore, that it was formerly necessary for the Bridge Company to transact, in Michigan, business conceded to be intra-state; that its right to do business in the State of Michigan has never been revoked or surrendered. The Bridge Company is still holding its authority to do business in Michigan, and has held such authority during the entire period covered by the claim for privilege taxes.

It is apparent, therefore, that the State of Michigan is not attempting to tax the Bridge Company for business which it has transacted or is about to transact in Michigan. On the other hand it is attempting to tax the Bridge Company for the existence of a RIGHT TO DO BUSINESS in MICHIGAN which right the Appellant

has held during the period covered by the tax levied. Regarding the case in this light it is manifest that the suit presents no Federal question. If the State is attempting to tax only a RIGHT to do business alleged to have been granted then it is obvious that this suit involves but one inquiry, viz:

> Has the Bridge Company held, during the period covered by the tax levied, a RIGHT to do business in Michigan?

Since the tax is aimed at the EXISTENCE OF THE RIGHT rather than the EXERCISE OF THE RIGHT it is apparent that an adjudication of the tax does not properly involve any inquiry as to what kind of business the corporation may have been doing, whether foreign commerce or under a federal franchise, etc. Assuming that during the full period covered by the tax in question Appellant's sole activities have consisted of foreign commerce (which we deny) and operations under a federal franchise, the fact remains:

(First) That the Appellant, a Michigan corporation, has a RIGHT to do business in Michigan; and

(Second) That under the statutes of Michigan as construed by its highest Court the mere existence of such right to do intra-state business is the object against which such tax is aimed.

The fact that the amount of the tax exacted is computed on the basis of the value of property which might be used in foreign commerce does not inject a Federal question in the case. So long as the tax is aimed at the RIGHT to do business, it is immaterial that the amount of the tax is predicated on the value of the property which might be employed in foreign commerce within the State. Thus, quoting from Cooley on Taxation, 4th edition, Volume 1, Pages 852-3:

"An annual franchise tax based on the proportion of outstanding capital stock represented by property in the State is valid whether the corporation is a domestic or foreign one, notwithstanding the property is used in interstate or foreign commerce."

See: St. L. S. W. Ry. Co. v. Arkansas, 235 U. S. 351, 59 L. Ed. 265.
Ashley v. Ryan, 153 U. S. 436, 38 L. Ed. 773.

The same rule would, of course, apply in reference to the computation of the amount of a franchise tax on the basis of the value of intra-state property used in the operation of a federal franchise.

This Court in problems of this sort (as distinguished from problems where the tax is on gross receipts derived from interstate and foreign commerce) looks to the fact that a domestic corporation is a creature of the State, and being such a creature is subject to peculiar tax provisions of the State creating the same.

The position of the State of Michigan in its right to exact a privilege tax from Appellant is sustained by the cases, supra, and we quote from the following language of Mr. Justice White taken from Ashley v. Ryan:

"It follows from these principles that a state, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained.

"The question here is not the power of the state of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in in-

terstate commerce within its confines, but simply the right of the state to determine upon what conditions its laws as to the consolidation of corporations may be availed of. Considering, as we do, that the payment of the charge was a condition imposed by the state of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that state, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof."

Since the tax in this case is a tax on the RIGHT to do business as a corporation and since the amount of such tax may lawfully be computed on the value of property used in interstate business or foreign commerce or in the operation of a Federal franchise, it is apparent that the method employed by the State of Michigan in computing the amount of the tax in this case can not be questioned by the United States Court as being a burden upon interstate or foreign commerce or upon operation under a federal franchise.

The statute relied on by the Detroit International Bridge Company herein to sustain the Appellate jurisdiction of this Court i. e. Sec. 237 (B United States Judicial Code U. S. C. A. Title 28 Sec. 344) is not applicable to the case at bar for the reason no Federal question is involved. In support of this contention the Appellee cites the following cases:

Henderson Bridge Company v. Kentucky, 166 U. S. 150.

Kansas City F. S. & M. Ry. Co. v. Botkin, 240 U. S. 227, 60 L. Ed. 617.

Arkansas and Memphis Railway Bridge and Terminal Company v. State, 295 Southwestern 378 (Arkansas) 275 U. S. 548

(certiorari having been denied by the Supreme Court, 275 U. S. 548).
Nebraska Ex rel Beatrice Creamery Co. v. March, 282 U. S. 799.

We respectfully submit the Supreme Court of Michigan in upholding the constitutionality of the statute has decided clearly in accord with the decisions, supra, of this Court applicable to the Federal question involved, and the Appeal should be denied.

PAUL W. VOORHIES,
Attorney General of the State of Michigan.

ALICE E. ALEXANDER,
Counsel for Appellee.

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IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1932

No. 51

DETROIT INTERNATIONAL BRIDGE COMPANY,
Appellant,

vs.

CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN,
Appellee.

Appeal from the Supreme Court of the State of Michigan

BRIEF FOR THE CORPORATION TAX APPEAL BOARD, Appellee.

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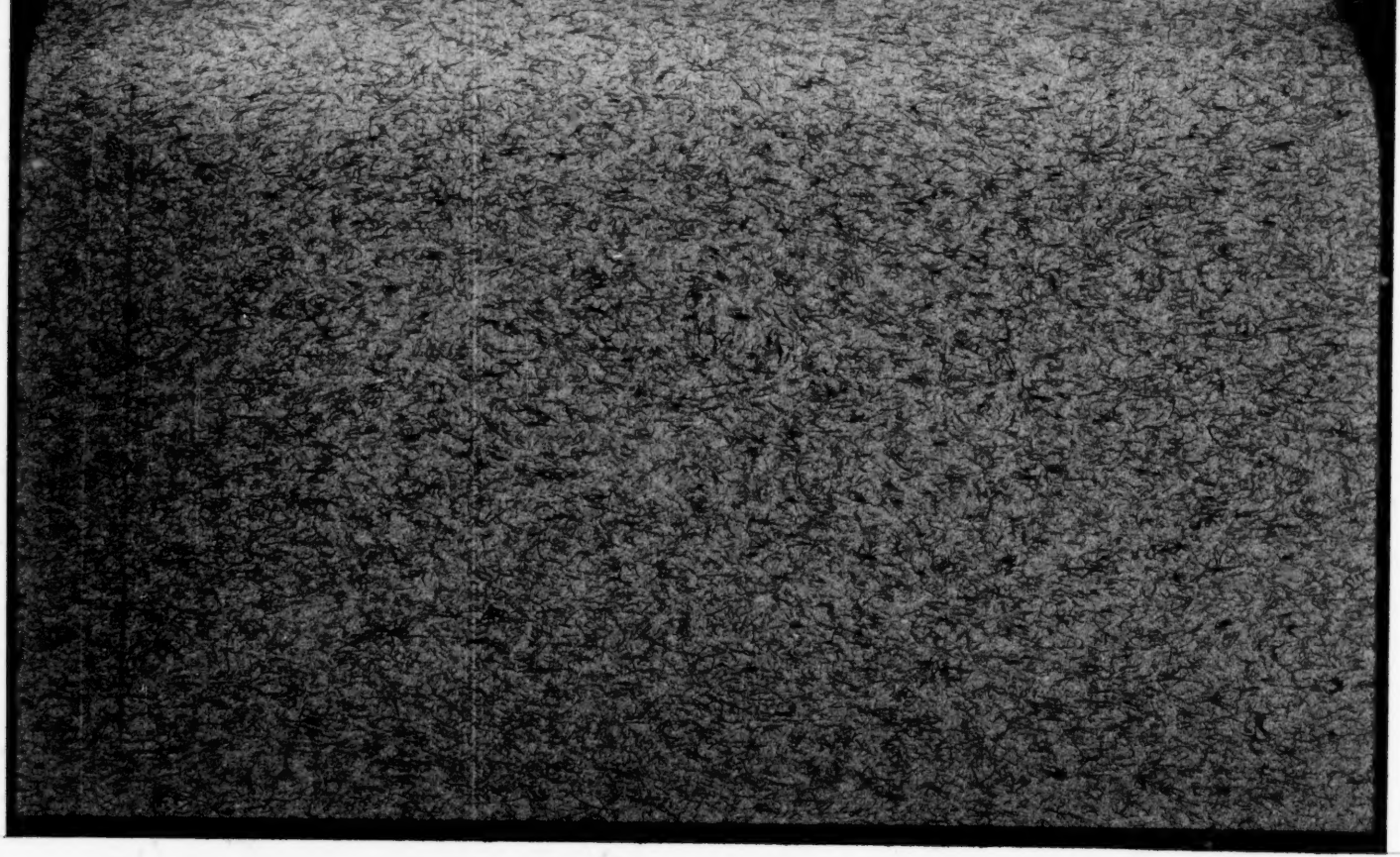

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CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR APPELLEE. THE CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN

SUPPLEMENTAL STATEMENT OF FACTS

A statement of the case from Appellee is necessary on account of certain omissions in Appellant's statement having an important bearing upon the question which Appellant asks this court to review.

This case represents an attack upon the constitutionality of Michigan's so-called privilege tax law,—Act 85, Public Acts of 1921, as amended,—with reference to its application to the Detroit International Bridge Co. This corporation is here on appeal from the final judgment entered by the Supreme Court of the State of Michigan April 5, 1932 (R-64) upholding and sustaining the Corporation Tax Appeal Board in its determination of the privilege tax for said year in all points at issue—except one, not an issue in this case. In the decision rendered by the State Supreme Court, Act 85, Public Acts of 1921 as amended, was held valid in its application to Appellant.

The Bridge Company, a Michigan corporation was organized *June 21, 1927*, with primary purposes set forth in its charter:

ARTICLE III.

"Constructing, owning and/or operating a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada."

ARTICLE III. (as amended *Aug. 5, 1927*)

"To construct, own and/or operate a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches thereto."

To maintain and operate such bridge and the approaches thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use.

IN FURTHERANCE AND NOT IN LIMITATION of the general powers conferred by the laws

of the State of Michigan and of the objects and purposes hereinbefore stated, it is hereby expressly provided that this corporation shall also have the following powers, that is to say:

To acquire by purchase, exchange, lease or otherwise, and to own, hold, erect, construct, operate, maintain, make, alter, enlarge and improve, and to aid or subscribe to the construction, acquisition or improvement of, convey, mortgage, sell, lease or otherwise dispose of, any and all real and personal property of every kind, corporeal and incorporeal, rights and privileges and any and all interests therein, necessary or incidental to or connected with any of the purposes of the corporation; and to perform any and all such acts either alone or jointly, or jointly and severally, with any other corporation or corporations, association or associations, domestic or foreign, or any firm or individual;

To take over the property, rights and privileges of any person, firm, association or corporation appropriate or required for the purposes of this corporation in whole or in part by purchase thereof or by acquisition of the capital stock of any such corporation or in any other manner; to pay for the same in cash or the stock, bonds, debentures, notes or obligations of this corporation or otherwise; to assume the whole or any part of the contracts, leases or other obligations of such corporation, or to take over such property subject to any such liabilities;

To purchase, redeem or otherwise acquire, and to hold, sell or otherwise dispose of, its own shares of stock (in so far as may be permitted by law) and its bonds, debentures, notes or other evidences of indebtedness;

To borrow money; either alone or jointly, or jointly and severally, with any other corporation or corporations, association or associations, domestic or foreign, or any firm or individual, to make, draw, accept, issue, endorse, negotiate and guarantee promissory notes, bills of exchange, bonds, debentures, warrants and other obligations and evidences

of indebtedness, whether secured, by mortgage, pledge or otherwise or unsecured, for money borrowed or in payment for property purchased or acquired or for any other lawful object; to mortgage or pledge any or all of its properties, rights, privileges and interests, including any shares of stock, bonds, debentures, notes or other obligations or evidences of indebtedness at any time owned or subject to disposition by it, and any such mortgage or pledge may be created by this corporation alone or jointly, or jointly and severally, with any other corporation or corporations, association or associations, domestic or foreign, or any firm or individual;

To acquire by purchase, subscription or otherwise, and to own, hold, use, sell, assign, transfer, mortgage, pledge, exchange or otherwise dispose of shares of stock, bonds, debentures, notes, scrip, securities, obligations, evidences of indebtedness or contracts of any corporation or corporations, association or associations, domestic or foreign, or any firm or individual or the United States or the Dominion of Canada or any state, territory or Colony of the United States or any province of the Dominion of Canada or any other foreign country or any municipality or local authority within or without the United States or the Dominion of Canada, and also to issue in exchange therefor stocks, bonds, debentures, obligations or other evidences of indebtedness of this corporation, and while the owner or holder of any such shares of stock, bonds, debentures, notes, scrip, securities, obligations, evidences of indebtedness or contracts, to receive, collect and dispose of the dividends, interest and income thereon or therefrom, and to possess and exercise in respect thereto all of the rights, powers and privileges of ownership, including all voting powers thereon;

To guarantee the payment of dividends upon any capital stock, and to become surety in respect of, endorse or otherwise guarantee the principal or interest or both of any bonds, debentures, notes, scrip or other obligations or evidences of indebtedness, or the

performance of any contract, lease or obligation, of any corporation or corporations, association or associations, domestic or foreign, or any firm or individual, in which this corporation may have a lawful interest, or any shares of stock of which or any bonds, debentures, notes, obligations, evidences of indebtedness or contracts of which or whom are held by or for this corporation, or whenever such acts are calculated to promote the welfare of this corporation or to maintain, extend or enlarge its business or to protect its interests, in so far as and to the extent that such action may be permitted by law;

To aid in any manner any corporation or corporations, association or associations, domestic or foreign, or any firm or individual, any shares of which or any bonds, debentures, notes, obligations, evidences of indebtedness or contracts of which or of whom are held by or for or in any manner guaranteed by this corporation or in the welfare of which or of whom this corporation shall have any interest, and to do any acts, designed to protect, preserve, improve or enhance the value of any property at any time held by this corporation or in which it may at any time have an interest;

To do every other act or acts, thing or things incidental or appurtenant to or growing out of or connected with said purposes, objects and powers, provided the same be not inconsistent with the laws under which this corporation is organized.

This corporation may maintain, offices or agencies, conduct its business or any part thereof, purchase, lease or otherwise acquire, hold, mortgage, convey and assign real or personal property, and do all or any of the acts herein set forth, outside of the State of Michigan as well as within said State."

The Appellant's offices are located in Detroit, Wayne County, Michigan, and its business transacted within the State.

It owns the bridge structure up to the middle of the

Detroit River and by stock ownership in the Canadian Transit Company, owns and controls the other portion of the structure from Canada to the center of the river.

The Bridge Company has been using its franchise—the privilege of doing business in Michigan—from the date of its incorporation up to and including the present time. The bridge structure was completed in October of 1929 and from that time on, the bridge has been open for use by the public; the Appellant maintained the bridge and collected tolls for its use.

The privilege of exercising its purposes as enumerated in Article III of its amended charter hereinbefore recited, does not limit the Bridge Company to the operation of the Bridge—or as alleged by Appellant—to that of carrying on foreign commerce—.

Appellant acknowledged its liability as to filing of annual reports and payment of privilege taxes exacted under Section 4 of Act 85, of 1921, as amended, for the years 1927, 1928 and 1929 respectively, and paid such fees. It tendered its 1929 annual report accompanied by the minimum privilege tax of $10.00 claiming exemption of the value of the bridge structure due to its use in foreign commerce and in addition alleged several other exemptions which were disallowed by the Secretary of State. Appellant thereupon withdrew its claim as to exemption of the bridge property admitting the bridge was not completed at the time the tax accrued and the Company was not engaged during this period in carrying on commerce. The Appellant appealed on all other points at issue to the Corporation Tax Appeal Board which sustained the Secretary of State and overruled all contentions presented by Appellant.

The 1930 report was submitted together with fees in amount of $147.92, purporting to represent a $2.00 filing

fee and $145.92 privilege tax. Appellant set up the same claim for exemptions as were raised in the 1929 report but here it raised the constitutional question which is on appeal before this court. The Corporation Tax Appeal Board sustained the Secretary of State in the determination of the fee, disallowing all claims presented by Appellant. Appellant then appealed to the State Supreme Court and several issues were presented. The State Supreme Court rendered its decision, holding the Corporation Tax Appeal Board without error, except as to one minor question, not an issue in this case. Appellant promptly filed with the State Court an application for re-hearing alleging that the court had overlooked one important issue—that of excluding the value of the bridge structure which was used in foreign commerce. The Supreme Court denied the application for re-hearing. (Original R. 95)

This issue was vigorously argued both in Appellant's brief and in oral argument and the fact that the decision of the State Supreme Court overruled points raised by appellant with the exception of one minor issue was proof conclusive that the court had in mind and had passed upon all questions involved in the issue. (See Judgment R-64.)

With these exceptions, the facts presented by Appellant are accepted and those essential will be set out in the argument.

ISSUE.

Two questions seem to be involved in this issue:

1. Is the imposition of the privilege tax a violation of the Commerce Clause of the United States Constitution?

2. Is the Bridge Company engaged in foreign commerce?

MICHIGAN STATUTES INVOLVED.

The privilege fee here claimed was imposed by the State of Michigan in accordance with the provisions of Act 85, Public Acts of 1921, as amended by Act 175, Public Acts of 1929, and provides in part as follows:

> "Sec. 4. Every corporation organized or doing business under the laws of this state, excepting those hereinafter expressly exempted therefrom, shall, at the time of filing its annual report with the secretary of state of this state, as required by Section 7 hereof, *for the privilege of exercising its franchise and of transacting its business within this state,* pay to the secretary of state, an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars." (Act No. 233 P. A. 1923) (Italics are ours)

This same section amended by Act 175, Public Acts of 1929 reads as follows:

> "Sec. 4. * * * It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, *having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period.*" (Italics are ours)

Section 5, Chapter 2, Part V of Act 84, Public Acts of 1921, as amended, in ways not affecting the issue at bar, provides in part as follows:

"Sec. 5. Every corporation organized for pecuniary profit * * * excepting only railroad companies and interurban railroad companies, telephone and telegraph companies, express companies and foreign insurance companies, shall, annually in the month of July or August file a report in duplicate with the secretary of state showing its condition at the close of business upon the thirty-first day of December, or upon the date of the close of its fiscal year, next preceding, on suitable blanks to be furnished by the secretary of state as hereinafter provided: * * * Such report shall furnish the secretary of state with all information and facts necessary for the computation of the annual franchise fee provided by law. The secretary of state is hereby authorized to require of any corporation any additional information that may be needed after the filing of its annual report for the purpose of computing such fee. * * * Such reports shall be * * * deposited in the office of the secretary of state within the said month of July or August accompanied by a filing fee of two dollars, and the amount of the annual franchise fee provided by law." * * *

ARGUMENT.

I.

THE IMPOSITION OF THE PRIVILEGE TAX IS NOT A VIOLATION OF THE COMMERCE CLAUSE.

It is undisputed that Appellant is a Michigan corporation enjoying all the rights and privileges which the State conveys upon subjects of its creation.

The State exacts of a profit corporation, an annual tax for the privilege of exercising its franchises and transacting its business within the State. It is claimed by Appel-

lant that its business is confined exclusively to carrying on foreign commerce.

Counsel for Appellant state on page nine of their brief:

> "Upon the completion of the bridge in 1929 and continuously thereafter, the Detroit International Bridge Company, the Appellant, has through its own officers and employees, maintained and operated this bridge. Not having other corporate powers or purposes, the Appellant engaged in no other business whatsoever."

The Bridge Company admits without question therefore, that prior to 1929 it was not engaged in foreign commerce. It must be conceded it was exercising certain purposes enumerated in its charter before its alleged engagement in foreign commerce, therefore other powers and purposes must exist under its charter.

Referring to Article 3, it will be found not only has this Appellant a right to construct, own and operate a highway bridge, but also enjoys the privilege of carrying on the business of a real estate dealer and a broker in securities. Surely purposes of this nature may not be classified as foreign commerce business.

The Bridge Company in its payment of the 1927, 1928 and 1929 annual privilege tax conceded that it was doing an intra-state business. The right or franchise granted under Michigan law to engage in intra-state business has never been revoked or surrendered. The Bridge Company still holds its charter and *right* to do business in Michigan and has held such *right* during the entire period of the tax in question.

The nature of the privilege tax has been so repeatedly determined by our State Supreme Court and also by the United States Supreme Court in the recent decision of: People of the State of Michigan vs. Michigan Trust

Company, 52 Sup. Ct. 512, that it seems useless to add further argument of our own. We shall refer briefly to the holdings in a number of these cases:

Union Steam Pump Sales Company vs. Secretary of State, 216 Mich. 261, wherein the constitutionality of the so-called privilege tax law was attacked, the court had this to say:

> "That it is not a property tax, but is a tax on the franchise to do business as a corporation within the state".

The court in that case proceeded to point out the distinction between the two primary franchises "to be" which belongs to the incorporators, and the franchise "to do" which belongs to the corporation, and determined the privilege tax under consideration levied on the franchise "to do".

In re Detroit and Windsor Ferry Company, 232 Mich. 574, a case involving the identical questions as here presented, although the Ferry company admittedly was carrying on foreign commerce. The Court said:

> "The Ferry Company is a Michigan corporation, and its property is located in Michigan. Its principal business is foreign commerce. The tax imposed is a specific tax—an excise tax. (Union Steam Pump Sales Co. v. Secretary of State, 216 Mich. 261.) It is not a property tax. It in no way interferes with interstate or foreign commerce.
>
> The act makes reference to the capital and surplus and takes them into account in fixing the tax, but the reference is not for the purpose of taxing the property but to determine what is a fair price to charge for the franchise privileges."

And the Court proceeds to cite many cases in support of its holdings.

> "Maine v. Railway Co., 142 U. S. 217. Flint v. Stone Tracy Company, 220 U. S. 107. Kansas City, etc. R. Co. vs. Stiles, 242 U. S. 111. Hump Hairpin Manfg. Co. v. Emerson, 258 U. S. 290."

In the last cited case it was said by Mr. Justice Clarke:

> "While a State may not use its taxing power to regulate or burden interstate commerce (United States Express Co. v. Minnesota, 223 U. S. 335 (32 Sup. Ct. 211); International Paper Co. v. Massachusetts, 246 U. S. 135 (38 Sup. Ct. 292, Ann Cas. 1918C, 617), on the other hand it is settled that a State excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principal of the cases so holding must be regarded as a settled exception to the general rule. Main v. Railway Co., 142 U. S. 217 (Sup. Ct. 121, 163); Wisconsin & Michigan R. Co. v. Powers, 191 U. S. 379 (24 Sup. Ct. 107); Flint v. Stone Tracy Co., 220 U. S. 107 (31 Sup. Ct. 342, Ann. Cas. 1912B 1312); United States Express Co. v. Minnesota, supra; Baltic Mining Co. v. Massachusetts, 231 U. S. 68 (34 Sup. Ct. 15); Kansas City, etc., R. Co. v. Stiles, 242 U. S. 111 (37 Sup. Ct. 58); United States Glue Co. v. Oak Creek, 247 U. S. 321, 326, 327 (38 Sup. Ct. 499, Ann. Cas. 1918E, 748). The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to

> amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

And in conclusion, the court said:

> "The rule forbidding a tax on interstate commerce applies with equal force to foreign commerce, but this does not aid the company, for *the tax in question is not one upon interstate* or *foreign commerce*, but a privilege tax imposed as an incident to the right to be a corporation, and exercise corporate functions by means of paid-up capital and surplus. The rule is too well settled that a State may not impose a tax upon interstate or foreign commerce to require the citation of authority. It is equally well settled that the *privilege tax* here involved is *not one upon interstate or foreign commerce*. The yardstick employed to measure the privilege tax scales the charge for corporate privileges granted and not to measure mere receipts from interstate or foreign commerce."

In examining the language of Section 4, Act 85, Public Acts of 1921 as originally enacted (supra) it will be noted the privilege tax was exacted

> "for the privilege of exercising its franchise and of transacting its business within this State".

The decisions in the Union Steam Pump Sales Co. and in the Detroit Windsor Ferry Company represent an interpretation of the language in the original statute. At that time the Supreme Court held it was an *excise*, not a *property tax* and that it was exacted for the *privilege* of doing business. In 1929 the legislature enacted Act 175, P. A. 1929 as amendatory to Sec. 4, Act 85, P. A. of 1921,

which removes all doubt as to the nature of this privilege tax:

> (Act 175—1929) " * * * It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

Therefore it will be observed our Supreme Court has held consistently to the same theory as to the nature of this tax since its inception, merely that it is an *excise* not a *property tax* and that it is imposed for the *privilege* of exercising corporate franchises.

Following this enactment the Truscon Steel Corporation vs. State, 246 Mich. 175, was before the State Supreme Court and it was found necessary in disposing of the issue to again define the nature of the privilege tax and the court said:

> "That this tax is not a property tax but is an excise tax in which the property is used solely as a yardstick."

In G. H. Hammond Company, 246 Mich. 179, we have a case of a Michigan corporation doing no business at all in the State and yet held liable for the privilege tax because of its nature. It had the *privilege* of doing business and for this *privilege* the tax was exacted. In substance it was held that the tax was not dependent upon the activities of the corporation, but on the *right* which existed to exercise corporate functions.

In reviewing this case the Court in the following significant language said:

> "Michigan has seen fit to adopt legislation by which the annual privilege fee is imposed upon a corporation organized under its laws regardless of whether the corporation does any business within the State. There can be no question but that the State is possessed of the power to impose such a tax upon its domestic corporations."

See also Cobbs & Mitchell vs. Corporation Tax Appeal Board, 252 Michigan, 479.

> "The privilege fee is an excise tax, not upon the right 'to be' a corporation, but upon the activities of the corporation in the exercise of its corporate franchise, or, as it is sometimes expressed, upon the franchise 'to do' " (authorities cited).

In re Detroit Properties Corporation vs. State, 254 Mich. 525,

> "The privilege fee is an *excise* tax, * * * *Actual transaction* of business by a domestic corporation is *not* a *condition* of the *tax.* It is imposed on the *right* to transact, (Italics are ours)".

In a recent case before this Court, People of the State of Michigan vs. Michigan Trust Company, 52 Sup. Ct. 512, in which was involved a question of receivership's obligation to pay the privilege tax, the nature of the statute was thoroughly analyzed and after pointing out a variety of *constructions,* as placed upon laws of this nature, by various courts, this Court said:

"We are not required to choose from these diversities the construction that would appeal to us as the most consonant with reason if choice were wholly free. Choice, as it happens, is not free, for our task is to ascertain the meaning of a Michigan statute, and as to that the courts of the State, if they have spoken pronounce the final word. The decision of the Supreme Court of Michigan in re Detroit Properties Corporation, 254 Mich. 523, is a controlling adjudication as to the meaning and application of the privilege fee exacted of Michigan corporations. The court held that the tax was imposed upon the privilege to 'do'; that this privilege existed though nothing was ever done: * * The tax in controversy is a State tax, and is laid not on the doing of business but on the mere privilege to do it. The State decision as to its meaning would control in case of conflict, but conflict there is none."

In view of the construction placed upon Section 4, Act 85, Public Acts of 1921, as amended, by the State Supreme Court in the cases enumerated, as well as the very clarifying opinion given by this Court in the People of the State v. Michigan Trust Co. (supra), we feel at a loss to understand how Counsel for Appellant maintains this tax in question is based upon the *doing* of business by a corporation or has any relation to the business transacted.

In the court below Justice Sharpe in commenting upon the constitutional question involved has this to say: (R-57)

"We are impressed that in the discussion of this matter counsel lose sight of the nature of the privilege fee sought to be collected. It is not a tax upon the proceeds of the business of the corporation. It in no way involves the tolls collected from those using the bridge as a means of transportation between

> Detroit and Canada. It is a fee imposed by law 'for the privilege of exercising its franchise and of transacting its business within this State.' "

In view of these judicial pronouncements, authorities cited and the clarifying language of 175, Public Acts of 1929 as amendatory to Section 4 of Act 85 Public Acts of 1921, we believe it is useless to add further argument in support of this point. It is apparent that the State of Michigan is not in this case attempting to tax the Bridge Company for the business which it has transacted in Michigan or the business in which it may engage. On the other hand, it is attempting to tax the Bridge Company for the *existence of a right to do business in Michigan,* which right Appellant has held during the period covered by the tax levied. Regarding the case in this light it is manifest that *no federal question is presented.*

If the State is attempting to tax only a *right to do business* alleged to have been granted, then it is obvious that this case involves but one inquiry, viz: *Has the Bridge Company held, during the period covered by the tax exaction, a right to do business in Michigan?* Since the tax is aimed at the *existence* of the right, rather than at the *exercise* of the right, it is apparent then an adjudication of the tax does not properly involve any inquiry as to what *kind* of business the company has been doing, whether foreign commerce or under a federal franchise, etc. The fact remains that Appellant applied for and has held during the entire period a right to do intra-state business in Michigan, and then too, under the statutes of Michigan as construed by its highest court, the mere *existence* of such *right* to do intra-state business is the object against which the tax is aimed.

It will be admitted the construction of the Michigan

statute as announced by our Michigan Supreme Court in its decisions (supra) will not be challenged by this Court.

The fact that the *amount* of tax exacted is computed on the basis of the value of property which might be used in foreign commerce does not inject a federal question in this case. So long as the tax is aimed at the *right to do intra-State business* it is immaterial that the amount of the tax is predicated on the value of the property which might be employed in foreign commerce.

Cooley on Taxation, 4th Ed., Vol. 1, Page 852-3.

> "An annual franchise tax based on the proportion of outstanding capital stock represented by the property in the State is valid whether the corporation is a domestic or foreign one, notwithstanding the property is used in interstate or foreign commerce."

And see:

> St. L. S. W. Ry. Co. vs. Arkansas, 235 U. S. 351, 59 L. Ed. 265.

Since the tax in question is a tax on the *right* to do intra-state business and since the amount of such a tax may lawfully be computed on the value of property used in foreign commerce it is apparent the method employed by the State of Michigan in computing the amount of tax will not be questioned by the United States Courts as being a burden upon foreign commerce.

We contend the Detroit International Bridge Company, Appellant, in this case, is not engaged in foreign commerce, it transports neither persons nor freight

across the Detroit River and it cannot in any sense be construed a carrier.

On page 10 of Appellant's brief it is claimed the Michigan Supreme Court has treated the Bridge Company as being engaged in the business of foreign commerce. This we emphatically deny. The question of foreign commerce was an issue before the Supreme Court and exemption was claimed for its entire capital assets due to its claimed use in foreign commerce. This contention was disallowed by the Court as the judgment entered (R-64) will affirm.

Following the decision of the State Supreme Court, the Appellant immediately filed an application for rehearing stating the Court had overlooked this matter of exempting its property due to its use in foreign commerce. The Court denied this re-hearing, evidencing its position in regard to the stand on foreign commerce. There is no doubt, had the State Court considered the Bridge Company engaged in foreign commerce, it would have exempted the property used in the operation of such business in accordance with the provisions of Section 5, Act 85, Public Acts of 1921, as amended. Therefore the State Court rejected the theory advanced by Appellant—that it was engaged in foreign commerce.

Counsel for Appellant argue in its brief (page 9) that upon the completion of the bridge in 1929 and continuously thereafter Appellant has maintained and operated this bridge not having other corporate powers or purposes, and that it engaged in no other business whatsoever.

If Appellant had no corporate powers other than maintaining and operating a bridge which it concedes began in 1929, under what authority did the Bridge Company carry on its business prior to 1929?

However, this is beside the question. The Michigan privilege tax law is not concerned with the *activities* of the corporation, but merely with the *existence* of the *right* or *franchise* which it has conveyed to the corporation.

It is undisputed the Bridge Company is a profit corporation with an authorized capital of $5,000,000.00 preferred stock and 100,000 shares of non-par, with a total property value as enumerated in its annual report for 1930 (R-26) aggregating approximately sixteen millions of dollars ($16,000,000.00). The amount of tax exacted in connection with this report for the year of 1930 totaled $2,935.95. Obviously the tax in question is small in comparison to the capitalization and property valuations of Appellant.

It would see strange indeed, if corporations could organize under state laws and evade the tax burdens merely by furnishing an instrumentality capable of use in foreign commerce. It certainly would represent an unwarranted effort to promote a federal enterprise at the expense of the State Government.

See:

4 R. C. L. p. 560.

> "Where the charter of a Bridge Company confers upon it the franchise and powers of building, maintaining, and operating its bridge and approaches designated as its terminal facilities, such franchises and powers do not, in and of themselves, constitute the Bridge Company a common carrier of property; on the contrary they are appropriately confined to the erection, operation, and maintenance of a thoroughfare or public highway, open to the use of others, common carriers and private persons, upon making compensation therefor."

See:

12 C. J. p. 37.

"It is not an act of interstate commerce to build and rent a bridge for the purpose of interstate commerce."

Lust in The Digest of Decision of the Interstate Commerce Act Vol. 1, p. 213 states:

"Bridge companies; Construction of charters; Common carriers: Where the charter of a Bridge Company confers upon it the franchises and powers of building, maintaining and operating its bridge and approaches designated as its terminal facilities, such franchises and powers do not in and of themselves constitute the Bridge Company a common carrier of property. On the contrary they are appropriately confined to the erection, operation and maintenance of a thoroughfare or public highway open to the use of others, common carriers and private parties, upon making compensation therefore in the shape of reasonable tolls," and cites Kentucky and Indiana Bridge Company vs. Louisville and Nashville R. Co., 2 I. C. R. 351.

In Paragraph H on the same page it is further stated:

"Where the charter of a Bridge Company makes its bridge and approaches thereto such as it had authority to construct a public thoroughfare or highway for the use of which, by railroads or street cars, wagons, vehicles, animals, and foot passengers, it was authorized to charge 'reasonable tolls' * * * is strictly applicable to charges for the use of its highway rather than to compensation for transportation services which the Bridge Company may perform or be permitted to render."

The fact that the Bridge Company has dedicated itself to public use in exercising a power of eminent domain does not of itself constitute it a corporation engaged exclusively in foreign commerce. Neither does the fact it secured a federal franchise under an act of Congress for the right to construct the bridge, necessarily impose an obligation upon the corporation to engage in commerce. Appellant's federal franchise was a mere waiver of permissive right and constitutes no bar to the tax.

The jurisdiction of the Federal Government over bridges across navigable streams is based upon the Government's right to control navigation. While it may occasionally annex to one of its Congressional permits certain conditions dealing with tolls, etc., in order to insure fair dealing between applicant and the public, ordinarily the only condition annexed to such a permit is that the bridge be built according to plans approved by the government. Therefore, one of these bridge franchises, resembles a waiver of an objection more than it does an affirmative grant of a privilege.

It is apparent, exercising the power of eminent domain, and securing a federal permit for the construction of the bridge, in no way confines the business of Appellant to that of foreign commerce.

We contend the Bridge Company itself is not engaged in foreign commerce because it in no way assumes responsibility as to traffic over the bridge other than that of ordinary negligence. It takes no part in the transportation of either persons or goods over its structure and does not engage in commerce of any kind. It merely furnishes an instrumentality by means of which commerce may be carried on and exacts payment in way of tolls for the use of such property. If the Bridge Company furnished transportation for passengers and goods

over its structure, and actually carried out the purposes as carrier, we would have a different question, but such a question is not before us and therefore not an issue in this case.

Regardless of whether or not this Appellant is engaged in commerce, the privilege tax would still be valid under the Constitution, since the determination of the tax is confined to property located within the State.

See:

St. Louis and East St. Louis Railway Co. vs. State of Mo., 256 U. S. 314.
United States Express Co. vs. Minn., 223 U. S. 335.
Fargo vs. Hart, 193 U. S. 490, Postal Telegraph and Cable Co. vs. Charleston, 153 U. S. 692-700.

II.

THE BRIDGE COMPANY IS NOT ENGAGED IN FOREIGN COMMERCE.

(a) *The Bridge Company, an owner—not a carrier.*

We admit the State cannot impose a burden by taxation on foreign commerce.

But on the other hand, the State may impose a franchise tax upon a corporation's *right* to do business, even though the corporation whose franchise is taxed is engaged in foreign commerce, and exclusively used in that commerce.

See:

Maine vs. Grand Trunk Railway Co., 142 U. S. 217-227-228.
Wisconsin Michigan Railway Co. vs. Powers, 191 U. S. 379.
Baltic Mining Co. vs. Massachusetts, 231 U. S. 68.

The question in this case is not whether Act 85, Public Acts of 1921, as amended, is valid as being an attempt to burden foreign commerce, but the question before us is—is the State in this case trying to apply the tax to acts of foreign commerce?

The Bridge Company is engaged in no foreign commerce, it runs no trains, owns no rolling stock and is not in the transportation business. The bridge owns an instrumentality which carries or the public may use in foreign commerce, but the Bridge Company itself has never carried either freight or passengers across the Detroit River.

Counsel contend that when the Bridge Company as owner, is engaged in maintaining the bridge, it is engaged in foreign commerce. This position does not seem well considered and counsel has cited no case sustaining such position.

Let us assume an instance where a corporation was organized for the purpose of constructing railway coaches which it leased to a carrier. The corporation maintained such coaches over the period covered by the lease. The carrier would be engaged in commerce, the coaches would be engaged in commerce, but could it be contended that the owner and builder was exempt from the privilege tax for the reason that:

1. That it was engaged in interstate commerce or,
2. That it was engaged in the maintenance, ownership and operation of an instrumentality of such business.

Obviously such contention would be absurd; and yet the analogy of such situation to the facts of this case is readily apparent.

With the cases and authorities hereinbefore cited, we

refer to the following decisions of this court in support of our contentions:

The Henderson Bridge Company vs. Kentucky, 166 U. S. 150, is a leading case and is sufficiently analogous to be decisive of this case. The suit was against the Bridge Company having an interstate bridge across the Ohio River. The suit being for the purpose of collecting intangible property tax. It was contended (as in this case) that the tax was a burden on interstate commerce; that the Bridge Company was engaged in interstate commerce:

> "Clearly the tax was *not* a *tax* on the *interstate business* carried on over or by means of the bridge, because the *Bridge Company did not transact such business.* That business was carried on by the persons and corporation which paid the Bridge Company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted. This very question was decided in New York, L. E. & W. R. Co. v. Pa., 158 U. S. 431, 439, where it was said: 'It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burden on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance' ". (Italics are ours)

While the last mentioned case did not involve precisely the same character of the tax as involved in this case, nevertheless the fact remains that the court was called

on in that case to decide whether an interstate Bridge Company is engaged in interstate commerce where it permits others to use the bridge upon paying for such privilege; and the court affirmatively declared that such Bridge Company was not so engaged. Counsel undertake to distinguish this case by pointing out that another character of tax was involved, but we fail to see where such distinction weakens the effect of such decision as an authority in this case. The court found it necessary, in determining liability, to answer the same abstract question which is presented in this case, viz; *Is the owner of this Interstate Bridge Company engaged in interstate commerce?* The court answers the question in the negative. We fail to see why such answer would be inapplicable to this case merely because of the variation of facts pointed out.

See the decision of the Kentucky Court of Appeals in this same Henderson case (31 S. W. 486) in which the court said:

> "This defendant company is not engaged in commerce or transportation at all. It has no authority or power or franchise to engage in commerce or transportation. It was simply authorized to build this bridge, and, when built, then the railroads that may be engaged in transportation, and so indirectly engaged in commerce, may transport merchandise and passengers over its structure, in consideration of reasonable rate of toll for so doing."

In Arkansas & Memphis Ry. Bridge & Terminals Co. vs. State, 174 Ark. 420-295 S. W. 378 (Certiorari having been denied by the Supreme Court, 275 U. S. 548). The facts in this case are almost identical to the case at bar

and should be controlling. In that case the State of Arkansas attempted to enforce its privilege tax against the Arkansas & Memphis Ry. Bridge & Terminals Co. for the privilege of doing business in the State. The Bridge Company was organized in Tennessee, but had been admitted to do business in Arkansas, therefore became subject to the imposition of the franchise tax.

Plaintiff contended its sole purpose was ownership and operation of an interstate bridge and therefore it was engaged exclusively in interstate commerce, and that the franchise tax imposed by the State was necessarily a tax upon interstate commerce. These conditions were denied by this court in refusing to entertain the writ of certiorari.

The distinction pointed out by Appellant in this Arkansas case,—that the Bridge Company did not operate the bridge, but leased the structure to others—is without force or effect. The fact that the owner of the property leased it to a carrier would be in the same category as the Detroit Bridge Company, owner, collecting tolls and rentals from individuals choosing to use the bridge. While it may be conceded there is a difference, it is without distinction.

Kansas City, Fort Scott & Memphis Railway Co. vs. Botkin, 240 U. S. 227. In that case the tax was an annual privilege tax on domestic corporations. It was measured by capital representing property used in interstate commerce whether within the State or without.

The Michigan privilege tax statute is fairer than the one in the cited case, because only property in Michigan is used in measuring the amount of privilege tax due. We believe this case is in point with the one at bar.

Appellant's attempt to distinguish this case by stating it was an annual privilege fee imposed upon the privilege of "being" or continuing "to be" a corporation rather than on the privilege of "doing" is absurd. It is a privilege tax in either case imposed by the State upon corporations of its creation. The franchise "to be" as pointed out in the Union Steam Pump Sales Case, 216 Mich. 261, is the initial franchise paid but once, upon the formation of the corporation, while the privilege tax is an annual fee exacted each year for the privilege of exercising corporate franchises whether the corporation chooses to exercise such franchises or not during any taxable period. See G. H. Hammond, 246 Mich. 179.

This court in reviewing the Kansas City case had this to say:

> "We take it to be simply a tax on the privilege of being a corporation—on the primary corporate franchise granted by the State. The authority of the State to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power."

And the court proceeds to cite authorities:

> "* * * It has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant to the Federal power merely because it is measured by authorized or paid-up capital stock."

This court proceeded to point out not only the cases where the precedent for which we are maintaining has been upheld, but also the cases where the law of the

State attempted to tax the business itself or the privilege of doing such business, Philadelphia & Southern Steamship Company vs. Pennsylvania, supra, wherein it is said:

> "The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different States, and between States and foreign countries, and from the charter of its vessels which was for the same purpose. It was necessarily concluded that the tax was imposed upon interstate commerce."

The distinction which this court pointed out in this case applies with full force and effect to the case at bar. Michigan is not attempting to tax the business or the privilege of engaging in a stated kind of business, but rather is imposing an annual tax in this case upon a domestic corporation for the mere naked privilege of exercising corporate powers.

Ashley vs. Ryan, 153 U. S. 436.

Mr. Justice White in delivering the opinion for the court said:

> "The purpose of the tender of the articles of consolidation to the Secretary of State was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured. Revised Statutes of Ohio, sections 3239, 3382 and 3384 b, amended

by act of April 11, 1890, 87 Ohio Laws, 183, 184. Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the State of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the State charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the Secretary of State exacted. As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its powers to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. * * * Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that State, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

Michigan's annual privilege tax was contained in the statutes when the Bridge Company was incorporated. Under the reasoning in the Ashley Case the Bridge Company accepted the annual fee provision as a part of its obligation to the State creating it.

While we have found no case holding that the mere

owning and maintaining of a bridge by a corporation constitutes commerce, yet we have found cases showing that it is not so engaged.

Kentucky & Indiana Bridge Co. vs. L. & N. Ry. Co., 2 Int. Com. Rep., Page 351, same being the decision of a United States Circuit Court sitting in Kentucky in which the court held:

> "The franchises and powers conferred upon petitioner of building, maintaining and operating its bridge and approaches, designated as its terminal facilities, do not in and of themselves constitute it a common carrier of property; on the contrary, they are appropriately confined to the erection and maintenance of a thoroughfare or public highway open to the use of others, common carriers and private parties upon making compensation therefor in the shape of 'reasonable tolls.'
>
> The powers and franchises conferred upon petitioner find their legitimate scope and operation in the building, operating and maintaining of its bridge and approaches thereto for the public purposes it was intended to subserve: That of furnishing and forming a highway over which common carriers and others should have the right or privilege of transporting goods, or passing as they pass over a turnpike, a canal, a ferry, upon paying reasonable tolls for the use of the structure or thoroughfare—*and do not in any way constitute petitioner a common carrier of goods* authorized to equip its road or to charge compensation for transporting goods on or over the same". (Our Italics).

In Keokuk & Hamilton Bridge Co. vs. Illinois, 44 Law E. 299, virtually the same state of facts was presented as in the Henderson Case. The court was called upon to decide whether it would impose a capital stock tax on a Bridge Company owning an interstate bridge. The defense of interstate commerce was raised. The court said "Nor was the tax a tax on interstate commerce", and quoted from the Henderson decision, supra.

CASES CITED BY APPELLANT DISTINGUISHED.

Covington & Cincinnati Bridge Co. vs. Commonwealth, 38 Law Ed. 966, is not in conflict with the other cases cited by us. In the Covington Case, the State of Kentucky attempted to *regulate interstate bridge tolls.* It involved entirely a different issue than is presented in this case. The court, of course, denied the right of a State to regulate interstate tolls. It is interesting to note, however, that the court, while holding an interstate bridge to be a highway for interstate commerce, remarked:

> *"* * * The Bridge Company is not itself a common carrier."*

See p. 969, 38 Law Ed.

In Pederson vs. Delaware, Lackawanna & Western Rd. Co. 229 U. S. 146. This case involves the right of recovery under Employer's Liability Act. An employee of the railroad company engaged in carrying bolts to be

used in the repair of a bridge was injured. The court held as an employee of the railroad company he was engaged in interstate commerce, but note this: *the employee was working for the railroad company, and was not working for an owner Bridge Company.*

We have found several cases holding that employees of carrier railroad companies, while engaged in repairing bridges, were engaged in interstate commerce; but we have found absolutely no case where an employee of a lessor or owner Bridge Company was held to be so engaged.

Philadelphia, Baltimore & Washington Railroad Company vs. Smith 250 U. S. 101. In this case it was held that a cook in a camp car on a siding near a railroad bridge (which bridge was being repaired) was engaged in interstate commerce. *But again as in the previous case the cook was working for the railroad company.*

The judicial decision that an *employee* of a *common carrier* is engaged in interstate commerce is no authority for a claim that an owner *Bridge Company* is engaged in interstate commerce.

Kinzel vs. Chicago, Milwaukee & St. Paul Ry. Co., 250 U. S. 130. This case comes under the Employer's Liability Act wherein an employee in charge of certain cars was injured. It was admitted the company was engaged in interstate commerce. The court held the employee was engaged in interstate commerce within the meaning of the act.

State vs. Bates & Rogers Construction Co., 19 Wash. 183-157, Pac. 483. The same point is involved. A contractor employed by the railroad company was injured in the repair of the bridge and the court held the employment was in the nature of interstate commerce.

We see no possible connection between cases of this nature and the one at bar. The Bridge Company is not engaged in commerce of any kind.

Glouster Ferry Co. vs. Pennsylvania, 114 U. S. 196: City of Sault Ste. Marie vs. International Transit Co., 234 U. S., 333: Mayor of Vadalia vs. McNeeley, 274 U. S. 676. These cases are readily distinguishable. Pennsylvania assessed a tax against a New Jersey corporation doing a purely interstate business. Admittedly this was an interference of interstate commerce and the court so held.

In the City of Sault Ste. Marie case a license tax is involved. This tax was exacted from everyone, whether corporation, partnership or individual before it could engage in the carrying of passengers between the American and Canadian shores. The license, it will be seen, applied directly to the business of carrying passengers. It regulated a matter which was subject to the exclusive control of Congress and was consequently unconstitutional.

The same is true of the Mayor of Vadalia Case, vs. McNeely, 274 U. S. 676, involving a license for operating a public ferry across the Mississippi River and carrying passengers. The question presented was whether or not the town could make its consent and license a condition precedent to the right to engage in transportation of passengers by means of ferry and it was held this it may

not do. The withholding of the license would necessarily prevent the owner of the ferry from transporting passengers and there would be a direct interference of the regulation of authority belonging to Congress.

Inasmuch as the *Appellant* is not engaging in carrying on transporting none of these cases are in point.

Ozark Pipe Line Corporation vs. Monier, the State Tax Commission of Missouri, 266 U. S. 555, Eureka Pipe Line Company vs. Hallanan, 257 U. S. 265; United Fuel & Gas Co., vs. Hallanan, 257 U. S. 277.

In the above cases Appellants were admittedly engaged in interstate commerce. Any tax levied against the carrier pipe line company on oil transported would necessarily be a tax upon the commerce. These cases cited would be more in point to the Bridge Company, had Appellant found a case where the producing company was held liable for the State tax rather than the pipe line company, actually engaged in commerce.

Appellant cites Philadelphia & Southern Steamship Company vs. Pennsylvania, 122 U. S. 326. In this case the Supreme Court held void a tax levied upon the gross receipts of a steamship company engaged in the transportation of passengers and freight—a common carrier. Again we have a direct interference with commerce in violation of the commerce clause. It is not in point with the case at bar.

It will be observed all cases cited and relied on by Appellant in support of its contentions represent corporations actually engaged in interstate commerce and the tax as levied in each case is directly upon the gross receipts of the corporation or the business transacted by the corporation, either of which constitute an interference with the power delegated to Congress. These cases are not controlling or even in point with the case at bar.

Since the tax in this case is a tax on the *right* to do intra-state business and since the amount of the tax may lawfully be computed on the value of the property used in foreign commerce, it is obvious that the method employed by the State of Michigan cannot be questioned by this court as being a burden upon foreign commerce or in violation of Article I, Section 8 of the Constitution of the United States (Commerce Clause).

In support of our position we cite the following cases which we contend are controlling in the issue before this court:

Henderson Bridge Company vs. Kentucky, 166 U. S. 150.
Ashley vs. Ryan, 153 U. S. 436.
Kansas City Ry. vs. Botkin, 240 U. S. 227.
Maine vs. Grand Trunk Ry. Co., 142 U. S. 217.
Flint vs. Stone Tracy Co., 220 U. S. 107.
Kansas City M. & B. R. R. Co., vs. Stiles, 242 U. S. 111.
Hump Hairpin Co., vs. Emerson, 258 U. S. 290.

which represent the uniform holding of this court.

CONCLUSION.

We summarize our reply to Appellant's assignments of errors as follows:

First:—The privilege tax assessed against this corporation is for the privilege of doing business and is not in violation of the Commerce Clause.

Second:—This corporation is not engaged in foreign commerce.

Third:—The property of plaintiff is not used by Appellant in foreign commerce, and therefore should enter into the computation of the privilege tax.

We therefore submit the judgment entered by the Michigan State Supreme Court should be affirmed.

Respectfully submitted,

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